Denver Law Review

Volume 5 | Issue 7 Article 9

1928

Vol. 5, no. 7: Full Issue

Denver Bar Association Record

THE DENVER BAR ASSOCIATION

RECORD

PUBLISHED MONTHLY

VOL. V DENVER, JULY, 1928 No. 7

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THE DENVER BAR ASSOCIATION RECORD

Vol. V | Denver, July, 1928 | No. 7

Published monthly by the Denver Bar Association and devoted to the interests of the Association.

Bar Primary Report

July 9, 1928

Henry W. Toll, President
The Denver Bar Association
Denver, Colorado

Dear Sir:

The Judiciary Committee of The Denver Bar Association begs leave to report that it has conducted a bar primary for the purpose of ascertaining the standing at this Bar of the candidates for the judicial offices to be voted upon at the fall election.

Ballots were sent to all members of the Association and to all Denver lawyers as well. Five hundred seven lawyers voted with the results shown on the enclosed total sheet.

The primary was held in order that the Republican and Democratic Assemblies to be held in the near future might be advised as to the relative standing at this Bar of the above candidates for the above mentioned judicial offices.

The above named candidates were placed upon the ballot in accordance

with the rules adopted and published prior to the mailing of the ballots.

Several ballots were received with the names of other lawyers written in but such names were necessarily disregarded.

In this primary every lawyer was privileged to vote for one Republican and one Democratic candidate for each judicial office or less if he desired.

No further primary will be held prior to the party assemblies.

Respectfully submitted,

ROBERT E. MORE,
Chairman.
IRA C. ROTHGERBER,
DUDLEY W. STRICKLAND,
LANGDON H. LARWILL,
PLATT ROGERS,
Judiciary Committee.

FOR DISTRICT JUDGE

Democrats		*Republicans*	
PIERPONT FULLER	202	FRANK McDONOUGH, SR.	416
		A. NEWTON PATTON	36
Total	202	Total	452

FOR COUNTY JUDGE

Democrats		*Republicans*	
F. E. DICKERSON	79	JAMES T. BURKE	12
BOSWELL F. REED	65	GEORGE A. LUXFORD	221
JOHN L. SCHWEIGERT	147	WILLIAM J. McPHERSON	24
		CHADWICK J. PERRY	19
		JOSEPH C. SAMPSON	63
		CHARLES H. SMALL	35
		WALTER E. WHITE	71
		ANDREW H. WOOD	46
Total	291	Total	491

FOR JUVENILE JUDGE

Democrats		*Republicans*	
ROBERT W. STEELE	370	FRANK L. HAYS	200
Total	370	Total	200

Half-Truths

"Half-truths are simple, but the whole truth is the most complicated thing on earth. * * * Talk about the 'survival of the fittest', but they never complete the sentence. It is not the abstractly fittest who survive. The sentence really is, 'the survival of the fittest to survive'; that is the fittest for a given environment. If you cast a minnow and the magnificent bull of Bashan into the Atlantic Ocean, there is no question which is the nobler organism, the abstractly fittest, but the great bull of Bashan will perish and the minnow will survive in that environment."—*Thos. B. Reed.*

"No man is the wiser for his learning. It may administer matter to work in, or objects to work upon; but wit and wisdom are born with a man."—*John Selden.*

Denver Bar Association Bar-B-Q

By JACK GARRETT SCOTT, *(By Request)*

ON Wednesday, June 27th, The Mount Vernon Country Club and environs witnessed a spectacle which had never before been presented to a waiting and thrill seeking world. Dignified judges of courts of record chased baseballs through the underbrush; barristers and solicitors of high repute and lofty mein exposed portions of their anatomy to be shot at in "nigger baby"; jurists of international repute wore blisters on their fingers tossing horseshoes at pegs; strong, silent lawyers swore fluently and forcefully as they searched for golf balls in the mesquite; men who frown at gambling fought bitterly at bridge to win checks of doubtful validity; others bounded after elusive tennis balls; and, all in all, a strenuous and hilarious time was had by all.

The program of events was varied and interesting, reaching its climax with the baseball game between a team of judges, captained by Judge Robert W. Steele, and one of lawyers, led by Wilbur Denious. For the first two innings it was anybody's game. But upon the retirement of Judge John T. Adams from his position at second base, either from exhaustion or stage fright, the game developed into a debating contest, Umpire Foley upholding the affirmative, and everyone else the negative. We are sorry to be compelled to report that there were strong rumors of undue influence having been exerted on the umpire, even reports of bribery being frequent; and Bill himself admitted at the close of the game that he had it fixed to prevail in all of his demurrers and motions for the rest of the year. It is perhaps on that account that the judges were allowed seven outs in the last inning, and that their side was reputed to have won the game by a large margin. This reporter witnessed Judge Calvert score three runs all by himself on one hit, at a time when he was not even on base. As an exhibition of baseball, the game was a failure; but as a spectacle of repartee, informality and hilarity, it was a grand success.

The Bar-B-Q itself followed the athletic events, after which all of the participants gathered around a great camp fire, with this same Bill Foley in the role of speaker of the evening, umpire and master of ceremonies. Members were entertained by the Denver Bar Association Quartet; Josiah Holland and Will Shafroth in the guise of two partly legal black crows; Floyd Miles and his Swedish friends; Will Bond and his bed side stories; and terminated with the presentation of prizes to those who had demonstrated their superior skill in the various events of the day.

To Morrison Shafroth and Hugh McLean went the prize for tennis which consisted of a tennis racquet each; although in selecting the winners of this event, a tie between the above two and E. V. Dunklee had to be resolved by the flip of a coin borrowed for the purpose, and the loser of the flip was presented with a dozen tennis balls.

Jack Phelps was the Bobby Jones of the crowd, winning first place in all of the golf events. He was presented with a set of matched wooden clubs as the prize for the low gross score, but he very graciously relinquished his right to the prize for low net, a golf bag, which went to L. B. Johnson. The prize for low twosome, a dozen golf balls each, was given to Jack Phelps and James Woods.

The evidence of the superiority of

the judges baseball team, a pennant, was presented to Hon. Robert W. Steele, the captain of the Judicial Benchwarmers.

For his outstanding achievements and blisters in the "nigger baby" game, Otto Friedrichs received a canteen, from which, presumably, he might lave his wounds.

Albert J. Gould, Jr., received a set of horseshoes for conquering the field in that game. Mention should be made of the fact, however, that he waited until after dark to play against Judge Wilbur M. Alter of Colorado Springs, being the only way he could beat him.

Cass E. Herrington and Robert J. Pitkin were handed checks in token of their having cleaned up at bridge. The amounts thereof and the losers' names were not made public.

James A. Woods, the official census taker, reports that 135 members of the bench and bar were present, and that 120 were served barbequed steak and fixings for dinner. The reliability of his count is open to question, but the figures are approximately correct. Judges Dennison, Walker and Adams of the Supreme Court, Judges Sackmann, Starkweather, Calvert, Bray, and Alter of the District Bench, and Judge R. W. Steele of the Juvenile Court honored the Bar with their presence. They are all complaining of aches and pains, aggravated by severe sun burns, but are apparently happy at having won the ball game, even though it required the active assistance of Bill Foley to do it.

The Bar-B-Q was such a success in every particular it should be made an annual event, and a tradition of the Association. And to the committee which so efficiently planned and arranged the affair, and the officials of Mount Vernon Country Club goes the thanks of all who attended.

Legal Ethics Committee

June 12, 1928.

To
Mr. Robert L. Stearns,
President of the
Denver Bar Association,
Denver, Colorado.

In compliance with your request that the Committee furnish an opinion respecting the practice of some lawyers in obtaining and retaining rebates from the publishers of newspapers in connection with the publication of legal advertising the following is submitted:

STATEMENT

A letter from the Secretary of The Colorado Editorial Association accompanying the request reads as follows:

"My dear Mr. Stearns:

"Within the past few weeks on different occasions it has been called to my attention that attorneys in Denver and the State of Colorado are requesting and in some cases demanding, that publishers pay them a fee or commission on legal publications. This practice, I am sure, is contrary to the ethics of the legal profession, and I wonder whether or not you can help us to eliminate this evil. While in some cases it may be true that the commission is credited to the account of the client, yet we have evidence in other cases that the money so received is being retained by the attorney himself.

"We do not wish to reveal any specific instances at this time, rather feeling that a general reference to this matter to your members might be sufficient. However, we have evidence on hand, and if we find the situation does not improve, we shall reveal the specific instances.

"While we realize it is not un-

ethical for a lawyer to take a commission or fee from an editor and credit it back to the client, yet we believe that in the interests of better relationship between the legal profession and the newspapers that the attorneys should not request a publisher to refund any part of a publication charge. In the usual run of legal publications the legal rate of today, which was established some thirty-five years ago, is much less than the ordinary commercial rate.

"Trusting that this action will meet your approval and that we may hear from you, I am

"Very cordially yours,"

OPINION

The question of the propriety of a lawyer's taking commissions for legal publications is an old one. If it is done without the client's full understanding and consent it is nothing but graft. If it is done with that consent there is nothing immoral about it, on the lawyer's part at least but it has the appearance of evil and therefore should be avoided. If the amount of the commission is credited to the client the procedure is not improper but useless and may some time lead to misunderstanding. What has been said above is true not only as to commissions for publications but as to commissions for anything else paid by a lawyer and charged to his client, and indeed as to anything paid by any agent or trustee and charged to his principal or beneficiary.

The Committee would suggest that publishers submit their bills for the actual amounts they are to collect. No lawyer with correct standards will object and if any lawyer does object the publisher must decide for himself if he presents a bill for a larger amount whether he is not a party to possible fraud against that lawyer's client.

Respectfully,

(Signed) EDWARD D. UPHAM,
Chairman,
For the Committee.

Another Bar Primary

(From Los Angeles Bar Association Bulletin, June 7, 1928)

"FULL campaign momentum is being reached by the Judiciary Campaign Committee. Weekly meetings have been held in conjunction with the Speakers and Organizations Committee, and contacts with the Publicity Committee maintained, in addition to continued sessions at the offices adjoining those of the Association.

Campaign work is divided mainly into three general departments: publicity, in which Mattison B. Jones acts in a co-operative capacity; speakers' bureau, under the supervision of Lawrence L. Larrabee, and finances, superintendended by Norman A. Bailie, chairman of the campaign committee.

A budget of the expenses of the entire campaign, as far as such can be determined, has been prepared. C. S. Loveland, auditor, daily receives all campaign subscriptions, and provides financial statements daily, weekly and monthly.

A large number of speakers, from the membership of the Association, have agreed to address meetings, setting forth the purposes of the plebiscite and advocating the bar ticket of candidates. More than 200 clubs and organizations have been canvassed with a view to arranging speaking dates and securing endorsement of the candidates of the Association. Many of the speakers will appear in other parts of the county.

Encouraging co-operation is shown in the response to the request for members to send letters to clients advocating the bar ticket, 15,000 letters having been promised immediately, and it is estimated that as many as 50,000 all told will have been mailed to lists provided by members of the Association. Aside from this source, numerous organization lists will be utilized, which will afford a distribution of about 60,000 additional letters.

The two outstanding objectives of the campaign are, first, familiarizing the public with the purposes of the Association; second, inducing the public to support the Association's candidates at the polls. Interviews from prominent citizens expressing approval of the work of the Los Angeles Bar Association are being secured."

Crime and the Gallows

By GEORGE K. THOMAS *of The Denver Bar*

BANDITS, machine guns, love triangles with the hypotenuse shot out, and organized murder are the order of the day. We have reached an era in which public apathy towards civic responsibilities, in hand with maudlin curiosity and misdirected sentiment have conspired to make it possible for the accused on trial for his life, to walk, with comparative ease, from the shadow of the noose into the arms of his cheering and admiring followers. Or if, perchance, the law exacts its penalty, the public is treated to a harrowing description of the execution and the erstwhile villain becomes another national hero. The virus thus distilled has penetrated every walk of life until it is small wonder that the professional gunman regards himself as a modern Robin Hood or that those who ought to know better, are seriously proposing the erection of a monument to Jesse James.

Just why, in an otherwise enlightened age, such things should be must give us pause for thought. Though fostered by the law's delay and tabloid journalism, their roots must be sought in certain fundamental social and economic forces which permeate modern civilization. It is an undisputed fact that more murders are committed today than yesterday, but considering the rapid increase in population, and particularly its concentration in our large cities, it is difficult to say whether there are actually many more homicides per capita than heretofore. The alarming feature is the unprecedented rise in the ratio of acquittals to convictions. Of what use is government by law if, when all the processes of the State have set to work in apprehension and trial, an offender can with impunity evade its penalty? Some suggest new and more drastic laws, but these are doomed to failure, since each carries within itself the blight which destroyed the old. Others suppose the American Jury is to be to blame and decry its frailties from every housetop. The jury is but a symptom and not a cause. We have abolished the professional juryman and with him we have buried a trained and hardened servant of the State. Much has been said and more written of our modern substitute. Many lawyers now advocate a trial solely to the court. There is no doubt but that such a system would be ideal for speedy administration of justice in all its branches. It presupposes, however, a divine infallibility in the court and

few, if any, of its advocates would risk their necks to the efficient mercy of a magistrate in preference to the time-honored "Twelve Good Men and True". A judge is as human as the man in the box, and while he may possess the official courage and training to do his duty, the enormous power over life and death so to be entrusted to his administration carries a responsibility greater than should in fairness be required of any man. Moreover, trial by jury is our heritage. It is embodied in our Constitutions and deeply ingrained within our social consciousness. Its abolition, therefore, no matter how desirable, could be actually accomplished through no agency short of revolution. It may not be the best of systems, but, so far as major criminal prosecutions are concerned, time and experience has shown it to be the safest. A suggested middle course, but one not calculated to cure the present evil, would be the classification of felonious or penitentiary offenses into major and minor felonies, the former to be tried before a jury and the latter to the court. Delay and expense in the adjudication of minor offenses would thereby be eliminated so as to clear our crowded dockets and make way for more efficient prosecution of major trials. Such is the tendency in civil procedure and once the Constitutional barrier be lifted, we may hope to see criminals tried before police magistrates for all offenses, save those against the person and the state.

Lacking such reforms, however, the prosecution and defense now face a body of twelve persons selected at random. As a rule male jurymen prevail, but women are not infrequently to be seen adorning the panel in many jurisdictions. Such a group is fairly representative of the community from which it has been drawn, reflecting the same in all its idealism and responding to its social and economic forces. Being wholly untrained and moved by sympathy for the accused who is held up to them as a victim of insanity or passion, they naturally shrink in capital cases from a verdict which they know will carry with it the penalty of death, little dreaming that they are violating their solemn oath. Their solicitude for the individual thus supplants their judgment of the merits. Men should be made of sterner stuff, but experience proves our modern jurors lack it sadly. If, therefore, an American Jury will not convict, the law which it is sworn to observe becomes unenforceable.

The evil, therefore, has its root in capital punishment. If by such means, society can still protect itself from the criminal or the insane, it should be applied with Spartan fortitude, but if it is regarded as a vestige of barbarism, unenforceable in modern highly organized communities, why not recognize it as such, and have it out? Time was when it was thought that the greater the punishment, the more forceful the example and the less danger of repetition of the offense. Upon the authority of such humane reasoning, punishments increased until petty larceny was listed as a capital offense. While it held sway, however, crimes not only increased in number but in magnitude. The petty offender was driven to desperation, preferring to be hanged for a sheep rather than a lamb and juries rebelled against convictions, well knowing that the same sentence must be imposed for stealing sixpence as for the taking of human life. It was eventually modified to conform to the requirement that the punishment should fit the crime, but here again the error of human judgment creeps in, for no two legislators can have the same perspective towards the crime and the punishment. Your militant dry may honestly believe that hanging is too good for bootleggers while his companion may just as honestly maintain that the cause is better served by

the imposition of a fine. In the absence of a Mussolini, therefore, the best that can be expected is that our laws should reflect the average will of the community in the light of its prevailing customs and manners. We shudder to read about the days of Salem witchcraft, and yet those same witch-burning Puritans might wonder why a man should be imprisoned for life because he possessed a modicum of rum. Like the jury system, however we have yet to find a better solution and our penal legislation must be accepted for better or for worse.

Assuming, then, that penal statutes are enacted for the two-fold purpose of punishing the offender for his offense against society and of restraining or preventing a recurrence of the act through example or fear of consequences, tempered by the requirement that the penalty should fit the crime, it may well be said that capital punishment is one of our most costly and useless relics. Useless because seldom enforceable and costly because it leads to sensational trials and acquittals that sap our moral strength and destroy regard for law. It can now be used solely in cases involving murder, treason or breaches of military discipline in time of strife. War, being a reversion to brute force, furnishes its own justification for the firing squad. The death penalty has yet to be exacted in this country for treason. It may well be said, therefore, that the advance of civilization has eradicated capital punishment in all cases save homicide.

In an age when millions are expended to preserve and prolong human life, murder, in any form, should be and is abhorred. Man has devised countless means to insure his survival against the ravages of disease and the elements. The forces of nature obey his commands, but he has yet to learn to master himself. Human passions, unless guided and bridled, are destructive influences, so subtle in their workings that no individual can with safety predict today, to what lengths they may lead him tomorrow. Our ancient forbears made no bones about the matter. They took what they could, kept it by force and if, perhance, they shed another's blood, the relatives were duly compensated by payment of the deceased's appraised valuation. National development put an end to individual power, the state assuming, for the protection of its members against each other, the duty of controlling their actions. Conversely, in return for the safeguards afforded him by the state, the individual parted with certain natural rights. Government by law supplanted that of force, order grew out of chaos and most citizens learned to control their actions through a common sense of self-preservation. Those who defy the rules imposed by society are outlaws and every community past, present and future must have its quota. Crime, therefore, is a social and economic risk at the head of which stands murder, which, like a smouldering fire, springs into flame when fuel is added or like a caged beast, leaps forth when locks are broken. The best that society can hope to do is to keep it under control and minimize the risk. Every acquittal and every public "martyrdom" of a condemned prisoner conspires to undermine the social structure and increase our criminal hazard until the day will come when human life becomes the most ungarded of human possessions.

Insanity is the "Open Sesame" for homicide and criminologists argue that pathologically every murderer is insane. The ancient Greek test for insanity was whether the individual could distinguish right from wrong. Medical investigation may succeed in demonstrating the accuracy of their philosophy. Indeed, the law has always recognized degrees of insanity, humanely seeking to excuse an offender proved

to be so mentally depraved that he is unable to make the distinction. But legal insanity and pathological insanity are now so hopelessly confused that it is small wonder twelve laymen should honestly disagree when called upon to solve a problem as yet undeciphered by scientific research. Granting, however, that the alienist is right and that murder is the act of a madman, should he, by that same token, be loosed upon society? No sane person would so contend, yet such is the effect of this modern plea, so popular that it has "out-alibied" the alibi. Occasionally it fails and the offender is executed, but then the deceased is wholly forgotten in the martyrdom of the condemned. Hickman, Snyder, Gray, Hamon and Thaw are household words. Who knows the names of their victims? Were Thaw and Hamon insane and Gray and Snyder sane? The law says, "yes", but medicine says "no", and while the two are wrangling, the fox escapes. We must accept one or the other. If we choose the law, insanity should not excuse. If it is medicine, the chair must yield to the Asylum.

Few physicians, however, are willing to go the full length of their theory. If taking human life be an act of insanity, is not mayhem also a sign of depravity? If mayhem be so classified, why not robbery and assault? If robbery, then also embezzlement and larceny? And so on until every crime be brought within the fold. Why should a jury deliberate for days as to whether or not a prisoner accused of murder be sane or insane and yet scoff at such a plea if made by a footpad? Why should doctors and lawyers endlessly debate over the degrees of criminal responsibility in a killer and never dream of bestowing such attention upon an absconder? Either the greater includes the less or a distinction must be drawn between one taboo and all others. Accepting the legal distinction of crimes against the person and crimes against property, the discrimination still prevails, the question becoming why insanity should be a successful defense to homicide and not to assault and battery? If we exact a life for a life, why not an eye for an eye? It is the shadow of the noose that intervenes. Just as a dispassionate man dreads the thought of bloodshed, just so will he shrink from the precepts of Mosaic law. Crime punishable by death thus becomes important in proportion to the severity of the sentence. If robbery with a gun were so penalized, this defense would instantly appear and juries then be called to pass upon the sanity of the unfortunate highwayman, his mother, brothers, sisters and children. Remove the death penalty, however, and the average juryman can intelligently ascertain the guilt or innocence of the accused. No longer blinded by compassion or victimized by fear of shedding innocent blood, he then can see and judge, content to let the court impose such sentence as the case may warrant. No better example could be furnished than the parallel cases of fiendish abduction and murder recently arising in the States of Michigan and California. In Michigan, where capital punishment has been abolished, the accused was apprehended, convicted and sentenced within a fortnight, while California presents the spectacle of a similar fiend using every defense known to American criminal law to save his neck and this in the teeth of his open confession of guilt. In the first instance the penalty of death is absent, in the second, it is the stake for which the parties are at play with the odds heavily favoring the accused.

So long, therefore, as stakes are high, so long will the defense employ every resource at its command, drawing from the fertile field of American sentiment and good natured sympathy, the pernicious elements from which it

fashions a means of escape. Unless we insist upon observance of the law and prompt and speedy punishment of offenders, we imperil the safety of our lives and homes. Unenforceable laws must go. Begin at the top. Impose life sentence as a maximum and the idea of judicial murder is dispelled. Should the innocent or the insane then be convicted and sentenced, opportunity for vindication and correction is afforded. Seven States of the Union have already done so and we have yet to hear that human life is less precious in Wisconsin than Missouri. On the contrary, the whole nation may profit by the example.

Colorado Supreme Court Decisions

(Editors Note—It is intended in each issue of the Record to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of).

No. 12,009

Holbrook v. Bank

Decided June 11, 1928.

Banks—Preferred Claims—Insolvency

Facts—The irrigation District sought to obtain a decree that a deposit standing to the credit of the Irrigation District in the Defendant Bank should be paid by the State Bank Commissioner as a preferred claim upon two counts:

1. That the Secretary of the Irrigation Company had unlawfully deposited the monies in the bank instead of remitting them to the County Treasurer. The Secretary of the irrigation company also being cashier of the bank, and that, therefore, the bank must be deemed to have accepted the deposits with knowledge that they were unlawfully deposited, and that such deposits must be treated as a trust fund.

Held—1. That to entitle a trust creditor to a preference, it must be satisfactorily established that the property of the insolvent remaining for distribution includes the proceeds of the trust estate.

No. 11,931

Conrad v. Davison

Decided June 4, 1928.

Release of Trust Deed—Innocent Purchaser.

Facts—Conrad held a note and a trust deed taken as collateral to secure an antecedent debt. He received same in reliance on the record showing a release of a prior trust deed at the written request of the payee, stating payment in full. Said release was executed before maturity of the obligation but not acknowledged or recorded until a year thereafter. Davison claimed the said release was invalid, setting up that the note was not in fact paid at that time and that later he had bought the note in a transaction of purchase and not of payment, that Conrad was put on inquiry by the release before maturity and the lapse of time between its execution and recording, and that an antecedent debt was not value.

Held—The note not being paid in fact, the release in question would be invalid except as against a subsequent bona fide encumbrancer for value. Conrad was such, as the rule that a release before maturity puts one on inquiry is not in point where the request for release is signed by the payee herself and states payment in full. The lapse of time between execution and

the acknowledgment and recording of said release is not material, nor is the contention that an antecedent debt is not value of any merit.

No. 11,967

Dawson v. Scruggs

Decided June 11, 1928.

Mechanic's Lien-Fixtures

Facts—Dawson sued the Scruggs-Vandervort Barney Realty Company et al., including Edward O. Lowy to seeure a personal judgment against Lowy and to have a mechanic's lien upon certain real property decreed and foreclosed. The Court below gave him a personal judgment against Lowy, but held against him on the lien claim. The lien was claimed for installing new pipes in a refrigerator plant that had been in use as a part of the building for fifteen years.

Held—Not necessary that in order to constitute a fixture that the pipes should be permanently affixed to the freehold, if it constitutes a part of a plant of machinery necessary to the successful operation of the whole, then it may properly be termed a fixture. The Plaintiff has a valid lien and is entitled to have it foreclosed.

No. 12,038

Armstrong v. Denver Saunders System

Decided June 4, 1928.

Statutes—Tax on Automobiles Transporting Passengers for Hire.

Facts—Defendants in error brought mandamus to compel the Secretary of State to issue licenses to them without the additonal fee required under S. L. 1927, Chap. 135, which imposed upon "motor vehicles used in the transportation of passengers for hire * * * an annual registration license fee of five dollars for each passenger seat in said vehicle at rated carrying capacity". Defendants in error rent automobiles to persons who themselves drive them, the rental contract providing that customers shall not use the car as "a private or public carrier of passengers for hire". Demurrer to the complaint was overruled. The Secretary of State stood thereon, and the writ being made permanent, appeals.

Held—These cars are not within the scope of the statute, for defendants in error customers are bailees and not passengers in the sense of the statute. The statute cannot be stretched to cover the case of lease of the car itself, especially where the rental contract forbids the customer to use it as a carrier for hire.

No. 12,068

Armstrong v. Johnson Storage

Decided June 4, 1928.

Motor Vehicles—Licenses—Mandamus

Facts—Johnson brought mandamus against Armstrong, Secretary of State to compel the issuance of a license for a motor truck upon payment of fees exclusive of those required by Session Laws of 1927 chapter 135. Defendant demurred to the alternative writ, demurrer was overruled, and defendant elected to stand and the writ was made permanent.

Held—The fact that Johnson was engaged in the business of transporting goods for hire over the streets of the City and County of Denver, and does not use the highways outside of the City of Denver, does not exclude him from the act. The streets of a city are highways of the State. The State has a right to license motor vehicles for hire within the limits of the City of Denver, at least until the City of Denver, under the Twentieth Amendment makes attempt to so license them itself and whether or not Denver has that right, it is not necessary to decide at this time.

No. 11,744

Colorado v. Riverview Drainage District.

Decided April 2, 1928.

Quasi-Public Corporation—Liability for Tort.

Facts—The Colorado Investment and Realty Company, hereinafter called Plaintiff, owned land in drainage district. Drainage ditch, as proposed, traversed plaintiff's land and if constructed as planned, would benefit the land. Land was assessed for benefits before ditch was constructed. Later proposed line of ditch was abandoned and ditch was actually constructed, so that it was of no benefit to the land in question. Land was sold for non-payment of drainage assessments, and plaintiff redeemed under protest, and brought suit for damages and to have assessment, etc., be decreed illegal, and for refund of the money paid and for restraining order.

General Demurrer was filed below and sustained on the one point that the drainage district cannot be sued because there was no statute authorizing suit against it.

Held—1. Drainage District not created by the State to remove the menace to public health, but constructed for the primary benefit to the owners of the land thereunder by making their lands productive, is not such a public corporation that the district may not be sued in a proper action.

No. 11,771

Rule v. Ling

Decided May 28, 1928.

Vendor-Purchaser-Merchantable Title

Facts—Plaintiff agreed to convey to Defendant by good and sufficient warranty deed certain land and to furnish an abstract of title, showing merchantable title. Purchaser went into possession under this executory contract of sale with consent of seller. When abstract of title was furnished, it showed that a prior grantor had made a reservation of certain oil and gas rights and purchaser refused to accept title.

Held—1. Abstract did not show merchantable title.

2. If Vendee has in good faith, after entering upon the land, made improvements upon the same, or planted crops, he may retain possession until he removes the same.

No. 11,822

Fleming v. Miller

Decided May 14, 1928.

Evidence at Former Trial—Insane Person.

Facts—M. sued F. for fraud and testified. Thereafter M. started another suit involving the same transaction, but became insane before trial. His testimony at the first trial was read at the second. F. was permitted to testify, but only as to the matters covered in the transcript of M's testimony at the first trial. F. claimed the right to testify about the whole series of transactions; M. objected to his testifying at all under C. L. '21, par. 6556.

Held—The error, if any, was in favor of F. and he cannot complain.

No. 11,839

Morley v. Post

Decided May 21, 1928.

Libel

Facts—Plaintiff below sued Defendant on three causes of action for libel. Demurrers to the Complaint were sustained by the Court below and Plaintiff elected to stand upon his Complaint.

Held—1. To constitute libel, it is not necessary that a publication shall impute to a person the commission of a crime, it is sufficient if it tends to impeach his honesty, integrity, virtue or reputation.

2. Where a qualified privilege is claimed, the condition that makes such a communication privileged is that it be not made maliciously.

3. Where words or cartoons are ambiguous in their import, or may permit more than one interpretation and in some sense be defamatory, the question whether they are such, is for the jury.

No. 11,862

Insurance v. Baker

Decided May 21, 1928.

Insurance—Waiver of Appraisement

Facts—Baker suffered a fire loss while insured in the companies noted. The adjuster's position was that Baker's loss was "slight, nominal ***", and he offered only $200.00, whereas Baker insisted the loss was total and $1000.00, the full face of the policy, was due. Baker sued and recovered in full, and the companies seek reversal on the ground of his non-compliance with the policy provision for appraisement "in the event of disagreement as to the amount of loss".

Held—Appraisement clause presupposes a *bona fide* disagreement. Here the company's attitude in substance was a deliberate attempt to create a disagreement and, hence, outside the scope of the policy's provision. Testimony further shows a repudiation of liability, which waived the right of appraisement.

No. 11,910

Hughes v. Pallas

Decided May 14, 1928.

Landlord and Tenant—Restrictions in Lease.

Facts—Jones leased premises from plaintiffs in error for a restaurant and cigar store. The lease provided the premises shall be used "for the purpose of conducting the business of a restaurant and cigar store; and for no other business". Jones allowed two churches and the Salvation Army to use the room for rummage sales on three separate days, and the lessors claiming such was a violation of the lease, seek to forfeit the same. Judgment went against the lessors, who appealed.

Held—"No other business" as used in the lease meant occupation and use of the premises permanent and continuous in its character, as distinguished from a single act or business transaction or an occasional day's use of the premises without rent or profit to anyone. Such a charitable use as here shown is outside the scope of the prohibition.

No. 11,917

Jones v. Panak

Decided May 21, 1928.

Assignment of Claim—Counter-Claim

Facts—One Pry built a house for Panak; on the agreed price there was due $2,772. Ply assigned this claim to Jones, who brought suit for this amount. Part of this was paid. Panak counter-claimed for more than the balance due from her, because of defective work by Pry, and judgment for this difference was awarded against Jones.

Held—On an assigned claim, the defendant may counter-claim against the assignee for an amount equal to the claim, but not for more than this.

Reversed

No. 11,918

Cortez v. Stabler

Decided May 21, 1928.

Fraudulant Conveyance—Purchase Money Trust.

Facts—C. Company brought this action to set aside a transfer of a farm from defendant Minnie Stabler to her husband. The trial court found that

the husband had paid the entire purchase price and all expenses of maintenance, and that C. Company had in no way been misled by the wife's apparent title.

Held—Payment of the price gave the husband the beneficial ownership under a resulting trust. Here, there was no gift or advancement to the wife and the elements of estoppel are lacking. The conveyance, therefore, cannot be set aside.

Affirmed

No. 12,076

Industrial Commission v. Nissen

Decided May 14, 1928.

Industrial Commission — Review — Course of Employment.

Facts—N. worked on his employer's farm and lived in his employer's alfalfa mill, a half-mile away. Going from the farm to the mill, he was killed. The District Court reversed the Commission's award denying compensation.

Held—This accident did not arise out of or in the course of N's employment, because there was no casual connection between the employment and the accident.

No. 12,081

Kansas v. Marshall

Decided May 21, 1928.

Evidence—Presumption of Death After Seven Years Absence.

Facts—Insured was forty years old, a sober, industrious farmer, happily married, with a family of three children. In September, 1920, he drove to Denver to attend a relative's funeral. He reached Denver safely and bought certain supplies for his family, such as groceries and the like, and placed them in his car, but thereafter failed to attend the funeral and disappeared without trace. Plaintiff sues as beneficiary, relying on the presumption of death arising from seven years unexplained absence. The company contests on the sole ground that the policy had lapsed for non-payment five years after the disappearance of the insured, and that no presumption as to death *within* the seven years arises where no showing is made of the absentee's contact with a specific peril. The jury found insured had died within the seven years and within the life of the policy, and found for plaintiff.

Held—The presumption arising after seven years' unexplained absence is that of death only, and not as to *time* of death, but evidence of character, health, domestic relations, and the like, making abandonment of home improbable, is pertinent on the latter issue, and here justified the jury in its findings.

International Law

"There can be no crime which leaves a man without legal rights. One is always entitled to insist that he shall not be punished, except in accordance with law, or without such a hearing as the universally accepted principles of justice demand. If that right be denied to the most desperate criminal in a foreign country, his own government can and ought to protect him against the wrong."—*Elihu Root.*

Requisites of a Lawyer

"Accuracy and diligence are much more necessary to a lawyer than great comprehension of mind, or brilliancy of talent. His business is to refine, define, to look into authorities, and compare cases and split hairs. A man can never gallop over the fields of law on Pegasus, nor fly across them on the wing of oratory. If he would stand on *terra firma* he must descend; if he would be a great lawyer, he must first consent to be only a great drudge."—*Daniel Webster.*

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